Supreme Court, U.S.
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No. _____

Supreme Court of the United States

JoAnn Carpenter,

Petitioner

v.

Federal National Mortgage Association,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petition for Writ of Certiorari

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the Circuit Court err when it concluded that a motion for summary judgment was appropriate without permitting Petitioner to engage in any discovery whatsoever when the evidence of the essential issues of motive and pretext was held exclusively by a defendant employer?

PARTIES INVOLVED

The following individual appeared as a plaintiff in the United States District Court for the District of Columbia and as an appellant in the United States Court of Appeals for the District of Columbia Circuit: JoAnn Carpenter. The Federal National Mortgage Association appeared as a defendant in the District Court and as an appellee in the Court of Appeals.

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No. _____

SUPREME COURT OF THE UNITED STATES

JoAnn Carpenter,
Petitioner

v.

Federal National Mortgage Association,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on April 27, 1999, affirming the decision of the United States District Court to dismiss her claim of workplace retaliation.

Opinion Below

A panel of the United States Court of Appeals for the District of Columbia Circuit issued a published opinion on April 27, 1999, which affirmed the District Court's summary dismissal of her action for workplace retaliation. *Carpenter v.*

Federal National Mortgage Ass'n, 174 F.3d 231 (D.C.Cir.1999). A copy of the opinion is reproduced at Appendix A. There were no petitions for rehearing or rehearing *en banc* filed.

Jurisdiction

This Court has jurisdiction of this direct appeal pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions

The Fourteenth Amendment to the Constitution provides, in pertinent part, that "No person . . . shall be deprived of life, liberty or property without due process of law . . . ."

Statutes Involved

Petitioner filed suit in the United States District Court for the District of Columbia pursuant to the District of Columbia Human Rights Act, D.C.Code §1-2501 *et seq.* on behalf of herself alleging employment discrimination. A copy of that statute is reproduced in Appendix C.

Statement of Facts

Petitioner seeks review of the April 27, 1999, judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed the district court grant of summary judgment on her claim of employment retaliation on the basis of gender.

Petitioner JoAnn Carpenter has served as a vice president and deputy general counsel at the Federal National Mortgage Association (Fannie Mae) legal department since 1987. In July of 1996, Fannie Mae promoted one of its newer vice presidents to a new supervisory and management role,

equivalent to senior vice president. Carpenter claimed that she was not considered for the position despite her seniority and superior performance. On October 17, 1996, Petitioner filed an employment discrimination lawsuit alleging gender discrimination under the D.C. Human Rights Act. Following lengthy and contentious discovery, the district court granted summary judgment to Fannie Mae. An appeal to the D.C. Circuit resulted in an affirmance. *Carpenter v. Federal National Mortgage Ass'n*, 165 F.3d 69 (D.C.Cir.1999) (*Carpenter I*).[1]

Within two weeks of filing her original appeal, Petitioner learned that she had been given a performance rating that was lower that those of the previous seven years, which significantly affected career advancement and compensation. Soon thereafter, the General Counsel for Fannie Mae–who was alleged to be part of the effort to discriminate in the first case–rejected the Petitioner for a promotion to a senior vice president position in that office.

On March 5, 1998, the Petitioner filed a second lawsuit, also under the District of Columbia Human Rights Act, D.C.Code §1-2525, which alleged that Fannie Mae had retaliated against her for pursuing *Carpenter I* by downgrading her performance rating and denying her a promotion to senior vice president.

Petitioner served a request for production of documents and a set of interrogatories on Fannie Mae with the complaint. Within 30 days of the filing of the lawsuit and without filing any responses to the pending discovery requests, Fannie Mae moved for summary judgment and explained the downgraded evaluation by contending that the evaluation pool had changed

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1 The decision of the Circuit in *Carpenter I* is the subject of a petition for writ of certiorari filed with this Court on June 3, 1999, and has been assigned No. 98-2020.

from prior years. Fannie Mae countered the failure to promote charge by claiming that the Petitioner was not selected for the promotion because it required litigation experience which she lacked. Upon the filing of the summary judgment request, the district court stayed all discovery and excused Fannie Mae from responding to any discovery request.

Petitioner replied to the district court that Fannie Mae's motion for summary judgment was premature given the complete absence of discovery. Despite this lack of discovery, Petitioner pointed out to the district court that the negative comments of some employees which were solicited under questionable circumstances were directly contradicted by positive evaluations from others and that contradiction raised a factual question regarding the truthfulness of the alleged criticism.

With regard to the promotion issue, Petitioner again pointed out that summary judgment was premature without discovery but that she knew as a matter of historical fact that "litigation experience" had never before been required of this position and that such a new requirement may be evidence of pretext.

Finally, Petitioner pointed out that the decision-maker's threat of retaliatory action if she pursued *Carpenter I* constituted direct evidence of Fannie Mae's intent to retaliate after the 1997 appeal and supported the inference that the downgrade and nonselection were linked to her pursuit of *Carpenter I.*

On August 3, 1998, the district court granted Fannie Mae's motion for summary judgment without discovery. This order was appealed and on April 27, 1999, a panel of the D. C. Circuit upheld the decision of the district court in a published opinion found at 174 F.3d 231.

In that decision, the panel found that the Petitioner had not produced significant evidence to dispute Fannie Mae's

asserted nonretaliatory reason. The panel decision approved of the decision of the district court to prohibit discovery and concluded that the facts advanced by the Petitioner did not create an inference of pretext and affirmed the district court dismissal in all respects. The panel failed to recognize the Catch-22 facing the Petitioner when it approved the trial court's ruling prohibiting discovery but at the same time finding Petitioner had failed to rebut Fannie Mae's evidence.

REASONS FOR GRANTING THE WRIT

I

THE OPINION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT THAT SERVE AS THE FOUNDATION FOR EMPLOYMENT DISCRIMINATION LITIGATION

Petitioner submits that the panel opinion below is a frontal attack on the core principles that underlie this Court's employment law decisions. The direct and unavoidable effect of the panel decision in this case is a conflict with the directives by this Court that have been relied upon as the foundation for employment litigation in such cases as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). These decisions hold that an employee must be given a full and fair opportunity to demonstrate pretext. Here, Petitioner had no opportunity to demonstrate pretext.

This Court has long concluded that it is a fundamental principle that a trial court may not even consider a motion for summary judgment where the non-moving party has not had an adequate opportunity to discover information that is essential to her opposition. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 at n. 5 (1986). In the context of employment discrimination cases the need for discovery is imperative where the employee must demonstrate that the employer's proffered explanation is false and a pretext for discrimination.

It is undisputed that the *McDonnell Douglas* burden shifting analysis applies in retaliation cases. The plaintiff must first establish a *prima facie* case of retaliation. This initial

burden is not great and in fact Fannie Mae did not challenge Petitioner's proof of the *prima facie* case.

Once the plaintiff establishes the *prima facie* case, there is a presumption that the employer unlawfully retaliated against the employee and that presumption then shifts the burden of production to the employer to rebut the *prima facie* case by producing evidence that the employment action was taken for a legitimate reason. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506-07 (1993). As the Court stated in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity." *Id.* at 255.

At this point, the employee "must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine,* 450 U.S. at 256. Moreover, the employee must have "a full and fair opportunity to demonstrate pretext." *Id.* at 256. As the *Hicks* Court observed, when the presumption "drops from the case" the plaintiff must have "the full and fair opportunity to demonstrate 'through the presentation of his own case and through cross-examination of the defendant's witnesses,' that the proffered reason was not the true reason for the employment decision." 509 U.S. at 507-08, *quoting Burdine,* 450 U.S. at 256. This opportunity is essential because sophisticated schemes to evade the requirements of the law are usually protected by multiple layers of pretext.

Petitioner had absolutely no opportunity whatsoever to demonstrate pretext since the trial court refused to permit any discovery in the case. Petitioner served interrogatories and document requests on Fannie Mae with the original retaliation complaint. However, the trial court, at the request of Fannie Mae, entered an order preventing Petitioner from obtaining any

discovery in the case simply because Fannie Mae filed a summary judgment motion.

On the other hand, the trial court granted summary judgment on the ground that Petitioner had not supplied enough evidence to demonstrate the falsity of Fannie Mae's proffer and non-discriminatory reasons for its actions. However, the evidence Fannie Mae supplied in support of its motion for summary judgment was contained in affidavits from officers of Fannie Mae who Petitioner was precluded from cross-examining by way of deposition or with answers to her proffered interrogatories or documents that Fannie Mae should have been required to produce in response to her document requests.

Petitioner is unaware of any appellate decision decided under the *McDonnell Douglas* framework in which a court refused to permit any discovery and then granted summary judgment in favor of an employer on the ground that the employee failed to demonstrate pretext. The panel decision sets an outrageous and dangerous precedent. Under the proposal contained in the panel opinion, all an employer need do to prevail in the face of a discrimination complaint is to obtain an order blocking discovery and then file affidavits alleging a non-discriminatory reason. The employee is then denied the rights this Court in *Hicks* and *Burdine* found to be fundamental: the full and fair opportunity to demonstrate pretext through cross-examination.

Petitioner, upon presenting evidence in support of her *prima facie* case, was entitled to discovery. There was no dispute that Petitioner had set forth sufficient evidence to make a *prima facie* case.

The practical effect of the panel's ruling is to encourage defendants to engage in pretextual dealings since such conduct now ensures that this type of misconduct will serve to prevent discovery of employment discrimination.

II

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH OTHER CIRCUIT COURT DECISIONS ON THE DISPOSITION OF SUMMARY JUDGMENT MOTIONS

Not only does the present panel opinion conflict with this Court's view of fundamental principles that govern employment litigation, but it also is in conflict with decisions from the Circuit Courts that have applied Rule 56(f).

Where the non-movant has not had the opportunity to obtain the necessary discovery to oppose a motion for summary judgment, Rule 56(f) outlines the alternatives available to the Court:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Petitioner conformed in every respect with this rule. She filed an affidavit stating reasons why she could not present facts essential to justify her opposition.

The thrust of Petitioner's affidavit was that she needed discovery in order to demonstrate that Fannie Mae's proffered explanations were false. Specifically, Petitioner stated in her Rule 56(f) affidavit that in discovery she intended to

demonstrate that the employer had created "litigation experience" as a false credential for the selection for the senior vice president position as a pretext to conceal its retaliatory motivation in denying Petitioner the promotion. This is an acknowledged method of demonstrating pretext. *See, e.g. Korbin v. University of Minnesota*, 34 F.3d 699 (8th Cir. 1994).

As to the downgrade in Petitioner's performance, Petitioner sought discovery for the purpose of demonstrating the criticism of Petitioner by others was a pretext for downgrading her performance for retaliatory reasons. Among the discovery Petitioner had already served on Fannie Mae was a request for the personnel evaluations of other vice presidents in the legal department who had received higher numerical performance ratings than Petitioner. This information was for the purpose of demonstrating others had similar criticisms in their file and had received higher performance ratings.

Without question this discovery sought information relevant and material to Petitioner's claims of pretext. In fact, the District of Columbia Circuit reversed a trial court in a discrimination case involving the same defendant one year earlier because the trial court refused to permit some of the same discovery Petitioner sought in this case. *Paquin v. Federal National Mortgage Ass'n*, 119 F.3d 23, 28 (D.C. Cir. 1997). Curiously, the panel in this case specifically referenced this earlier decision in its oral argument and indicated from the bench that this earlier decision was controlling. The failure of the panel to even address the *Paquin* decision in its written opinion is peculiar at best and is demonstrably unequal application of employment law within the same jurisdiction.

Petitioner also stated specifically in the Rule 56(f) affidavit that she sought to cross-examine in deposition the selecting officials with regard to the promotion and the Petitioner's supervisors and those who Fannie Mae identified

as criticizing Petitioner's performance with regard to the downgrade in her performance.

The panel opinion renders Rule 56(f) a nullity in the context of an employment discrimination case. The panel reasoned that Petitioner's expressed need for discovery was based on speculative theories for demonstrating pretext. As an initial matter, Petitioner did provide a factual showing that supported her theories. Regardless of the panel's opinion of the likelihood that Petitioner would uncover sufficient evidence to support her theories, Petitioner was entitled to the discovery before the panel ruled on the motion for summary judgment.

It is critical to remember that the evidence necessary to demonstrate the falsity of the employer's explanation and its pretextual nature is almost always exclusively in possession of the employer. The failure of the panel to acknowledge that fact places it in conflict with decisions of this Court and other circuits. In the analogous situation of antitrust cases, where intent is an issue and "the proof is largely in the hands of the alleged conspirators . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted sparingly." *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976). Similarly in stockholder derivative suits under Rule 10(b)(5) where the defendant is in control of the knowledge, intent and motive that are essential to the stockholder's claim, summary judgment is not granted without the opportunity for discovery. *Schoenbaum v. Firstbrook*, 405 F.2d 215, 218 (2nd Cir. 1968).

Similarly, the Fifth Circuit has ruled that a trial court abused its discretion in granting summary judgment when it failed to recognize that a salient factor for the trial court to consider in ruling on a Rule 56(f) motion is a party's comparative access to the witnesses or material relevant to the disposition. *Littlejohn v. Shell Oil Co.,* 483 F.2d 1140 (5th Cir.)*(en banc)*, *cert. denied*, 414 U.S. 116 (1973). In addition,

the Eleventh Circuit has reversed the grant of summary judgment six months after a complaint was filed because the plaintiff did not have the opportunity to engage in discovery. *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988).

Discovery, by its nature, assumes the party seeking it cannot identify with specificity the evidence that supports the reason the employer's explanation is false. Applying this principal to employment cases, the Second Circuit has ruled that in the absence of discovery, "it cannot be said that plaintiff had a full and fair opportunity to show that [employer's] articulated reason for his dismissal was pretextual." *Sutera v. Sherring Corporation*, 73 F.3d 13, 18 (2nd Cir. 1995); *accord, Meloff v. New York Life Insurance Co.*, 51 F.32d 372, 375 (2nd Cir. 1995). Similarly, the Sixth Circuit has ruled that summary judgment was premature where the employee had not had the opportunity to obtain discovery regarding information in the employer's exclusive possession. *Service, Hospital, Nursing Home and Public Employees Union v. Commercial Property Services*, 755 F.2d 488, 507 (6th Cir. 1985)[2]

When the issues of motive and intent form the heart of a plaintiff's case, courts of appeals in the past have always permitted the plaintiff to engage in discovery that is essential to uncover evidence concerning subjects that are in the exclusive control of the defendant. To advance the search for the truth,

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2 The Circuit's reliance on *Randall v. Howard Univ.*, 941 F.Supp. 206, 213 (D.D.C.1996), a case in which discovery was not an issue, highlights the court's failure to appreciate the difference between a situation in which full discovery was present and one in which no discovery was permitted. This reasoning results in the precedent that a plaintiff denied the right to obtain any discovery stands in the same shoes as one who has had complete discovery when addressing a motion for summary judgment.

the parties must not be permitted to hide the true facts behind a wall of pretext. The present panel opinion not only permits such subterfuge, but encourages it with the patina of a legitimate defense. Such a radically new direction in the development of summary judgment rules requires swift and decisive intervention by this Court.

CONCLUSION

The process of civil discovery is the most effective, and indeed often the only, method by which litigants can uncover the truth. This is particularly true when motive and intent are the central issues. The quickest and easiest way to prevent discovery is the use of the sledgehammer of summary judgment prior to uncovering the truth. By permitting an employer's bald explanation to defeat the truth seeking process, the panel opinion encourages the practice of pretext and ensures that the sophisticated lawbreaker goes unpunished. Wherefore, Petitioner respectfully requests this Court to grant a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

Appendix A

JoAnn CARPENTER, Appellant,
v.
FEDERAL NATIONAL MORTGAGE ASSOCIATION, Appellee.

No. 98-7170.
United States Court of Appeals,
District of Columbia Circuit.

Argued March 23, 1999.
Decided April 27, 1999.

Before: EDWARDS, Chief Judge, SENTELLE and HENDERSON, Circuit Judges.

Opinion for the court filed by Circuit Judge KAREN LeCRAFT HENDERSON.

KAREN LeCRAFT HENDERSON, Circuit Judge:

JoAnn Carpenter, employed at the Federal National Mortgage Association (Fannie Mae), appeals the district court's grant of summary judgment to Fannie Mae on her claim that her supervisors retaliated against her in violation of the District of Columbia Human Rights Act (DCHRA), D.C.Code §§1-2501 *et seq.* Carpenter specifically alleges that they retaliated by downgrading her performance rating and by rejecting her for a senior vice president position following her decision to appeal the district court's dismissal of her original discrimination claim against Fannie Mae. Carpenter now contends that she presented sufficient evidence to allow a

reasonable jury to conclude that Fannie Mae's proffered reasons for her downgrading and nonselection were pretextual. Alternatively, Carpenter asserts that she should be allowed discovery. We affirm for the reasons set forth below.

I.

Since 1987, Carpenter has been a Vice President and Deputy General Counsel at Fannie Mae. In the summer of 1996, Fannie Mae decided to promote a different vice president into a new supervisory position. Carpenter claimed that she was not considered for the position despite her seniority. On learning of the promotion, Carpenter met in September 1996 with her supervisors, Anastasia Kelly and Anthony Marra, and complained of gender discrimination. According to Carpenter, Marra told her to "drop" her claim and Kelly warned her to "not cut off [her] nose to spite [her] face." *Carpenter v. Federal Nat'l Mortgage Ass'n*, No. 1:98CV00563, at 9 (D.D.C. Apr. 20, 1998) (Aff. of Pl. JoAnn Carpenter and Rule 56(f) Aff.) [hereinafter 56(f) Aff.], Joint Appendix (JA) 74.

On October 17, 1996 Carpenter filed an employment discrimination lawsuit, alleging gender discrimination under DCHRA due to Fannie Mae's refusal to promote her and for certain retaliatory acts that occurred after she gave notice of her claim. Following contentious discovery that included allegations of untruthful statements by Kelly and Marra, the district court granted summary judgment to Fannie Mae, *see Carpenter v. Federal Nat'l Mortgage Ass'n*, No. 96-2399 at 28 (D.D.C. Oct. 28, 1997) (*Carpenter I*), and we affirmed, *see Carpenter v. Federal Nat'l Mortgage Ass'n*, 165 F.3d 69 (D.C.Cir.1999). Within two weeks after filing her appeal, Carpenter learned that she had been given a performance rating of 4+, a slight downgrade from the ratings of 5 and 5- that she received for the previous seven years. Soon after, Kelly

rejected Carpenter for a senior vice president position that had opened up in the General Counsel's office.

On March 5, 1998 Carpenter filed a second lawsuit under DCHRA, D.C.Code §1-2525(a),[1] against Fannie Mae alleging that it had retaliated against her for pursuing *Carpenter I* by downgrading her performance rating and denying her a promotion to senior vice president. *See Carpenter v. Federal Nat'l Mortgage Ass'n*, No. 98-563 (D.D.C. Aug. 3, 1998) (*Carpenter II*), JA 8-19. In response, Fannie Mae moved for summary judgment, contending that: (1) it gave Carpenter a lower rating because her performance was compared against a larger pool of vice presidents than in the past and because Julie St. John and Michael Williams, two senior vice presidents in client departments, had criticized her work[2] and (2) it rejected Carpenter for the senior vice president position because it

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1. In relevant part, section 1-2525(a) states, "It shall be an unlawful discriminatory practice to ... retaliate against ... any person in the exercise ... of ... any right granted or protected under this chapter." *See also Blackman v. Visiting Nurses Ass'n*, 694 A.2d 865, 868 (D.C.1997) (looking to federal law to interpret DCHRA).

2. St. John, Senior Vice President for Guaranty and Franchise Technology, and Williams, Senior Vice President for Customer Technology Services, were internal clients of Carpenter's legal services at Fannie Mae. *See Carpenter v. Federal Nat'l Mortgage Ass'n*, No. 1:98CV00563, at 4 ¶¶ 12-14 (D.D.C. Mar. 31, 1998) (Decl. of Anthony F. Marra), JA 55. St. John criticized Carpenter's work on a Y2K project as "weak" in that she "was not proactive in seeking to identify and solve potential legal issues." *Id.* Williams stated that Carpenter needed to "become more proactive and to assume greater responsibility as an advisor to the business." *Id.*

desired an attorney with litigation experience (which she admittedly did not have). Carpenter countered that Fannie Mae's motion was premature given the lack of discovery. As to her rating, Carpenter argued that her past evaluations and comments of other "clients" directly contradicted the criticisms against her and therefore raised an issue as to whether Kelly and Marra actually relied on the criticisms in downgrading her. As to the promotion, Carpenter argued that "litigation experience" had never been a prerequisite for senior vice president and questioned whether Fannie Mae had in fact relied on the criteria. Finally, Carpenter argued that the September 1996 admonitions of Kelly and Marra to give up her discrimination claims constituted direct evidence of their intent to retaliate after her 1997 appeal and therefore strengthened the inference that her downgrade and nonselection were linked to her pursuit of *Carpenter I.*

On August 3, 1998 the district court granted Fannie Mae's motion for summary judgment without discovery and found that: (1) the September 1996 Kelly/Marra admonitions related solely to *Carpenter I;* (2) Fannie Mae's explanation of the downgrade (i.e., a larger pool of vice presidents against whom Carpenter was evaluated and the criticisms of two clients) demonstrated a legitimate,non-discriminatory rationale and, absent evidence that the criticisms were fabricated, her claim failed; and (3) Fannie Mae's explanation of her nonselection as senior vice president (i.e., the requirement of litigation experience) was also non-discriminatory. The district court further found Carpenter's contention that discovery might prove otherwise speculative. See JA 10-19. Carpenter timely appealed.

II.

Carpenter urges that the district court erred in granting summary judgment because Fannie Mae allegedly retaliated against her in violation of DCHRA when it gave her a 4+ rating rather than the 5- she had received in the previous rating period.[3] Fannie Mae responds that the number of vice

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3. A DCHRA plaintiff must first make a *prima facie* showing of retaliation. *See McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C.Cir.1984); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1086 (D.C.1994) (burden of proof for claim of disparate treatment based on federal law applicable to DCHRA). To do so, he must establish that he was engaged in a protected activity, that his employer took adverse personnel action against him and that the two events were causally connected. *See Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 368 (D.C.1993). After the plaintiff makes a *prima facie* showing, a presumption of retaliation arises that shifts the burden of production to the employer to rebut the *prima facie* case by producing "clear and reasonably specific" evidence that its actions were taken for legitimate, nonretaliatory reasons. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). If an employer meets its burden of articulating a non-retaliatory reason, the burden of production shifts back to the plaintiff, who "must have the opportunity to demonstrate that the proffered reason was not ... true." *Id.* at 256. The plaintiff's burden of production "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* The plaintiff can meet the burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (*citing McDonnell Douglas Corp.*, 411 U.S. at 804-05). If he successfully shows that a retaliatory motive played a motivating part in an adverse

presidents against whom Carpenter was rated increased from eight to thirteen in 1997 as a result of reorganization, making the rating pool more competitive. Fannie Mae also cites negative evaluations from Williams and St. Johns that contrast with the uniformly positive comments received by her higher rated peers. These explanations provide legitimate, nonretaliatory reasons for Carpenter's downgrade. *See Burdine*, 450 U.S. at 257-58.

Moreover, Carpenter has failed to show that Fannie Mae's explanation was pretextual. We first reject her underlying contention that because she previously received a 5- and her performance has not changed, she had to have earned a 5- for 1997. *See Fischbach v. District of Columbia Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C.Cir.1996) (absent "error too obvious to be unintentional," court respects employer's "unfettered discretion" to evaluate employees) (citation omitted); *Billet v. CIGNA Corp.*, 940 F.2d 812, 826 (3d Cir.1991) (rejecting argument based on past evaluations as theory "that things never change, a proposition clearly without basis in reality"), *overruled in part on other grounds by St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Pre-1995 ratings were done by other

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employment decision, the employer can nevertheless avoid liability by demonstrating by a preponderance of the evidence that it would still have taken the same action absent retaliatory motive. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1125 (D.C.Cir.1999). We review *de novo* the grant of summary judgment, applying the same standard utilized by the lower court. *See Transactive Corp. v. United States*, 91 F.3d 232, 236 (D.C.Cir.1996).

supervisors and, of the vice presidents who received higher ratings than Carpenter in 1997, only one had been compared to Carpenter previously, receiving higher ratings than she in two previous years. We also find Carpenter's claim that St. John's and Williams's criticisms were the product of collusion and fabrication without record support. *See Randall v. Howard Univ.*, 941 F.Supp. 206, 213 (D.D.C.1996) (granting summary judgment where plaintiff offered no evidence to support theory that employees conspired against her), *aff'd*, 132 F.3d 1482 (D.C.Cir.1997). Rather, Carpenter's admission that she had "little contact" with Williams may explain his view that she needed to assume greater responsibility and her failure to work directly with St. John on the Y2K project may similarly have led St. John to believe that she needed to be more "proactive." 56(f) Aff. at 4, 5 ¶¶ 13, 17, JA 69, 70; *see Valentino v. United States Postal Serv.*, 674 F.2d 56, 66 (D.C.Cir.1982) (management judgments regarding professionals often depend on subjective criteria). Although Carpenter infers retaliatory intent from her supervisors' September 1996 comments, they also do not constitute evidence sufficient to allow a reasonable jury to infer that Fannie Mae's reasons for her November 1997 rating were false. Carpenter herself cites a narrative evaluation of her 1996 performance, which Marra wrote in March 1997 after his September 1996 comments and after she filed *Carpenter I* in October 1996, as an accurate portrayal of her performance and evidence that the November 1997 rating must be the product of retaliation. *See Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1136 (7th Cir.1997) (intervening satisfactory rating defeats causal link).

Because Fannie Mae offered a legitimate nondiscriminatory reason for not selecting Carpenter for the senior vice president position--i.e., that Carpenter admittedly lacked the necessary litigation experience-- Carpenter was

required to show pretext by "demonstrat[ing] that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. Aside from Kelly's and Marra's September 1996 comments, the contentious nature of *Carpenter I* and the cold shoulder treatment which purportedly followed, Carpenter merely theorized that litigation experience was a "false qualification" intended solely to explain away her nonselection. Although Carpenter contends that the Position Description form left the criteria for senior vice president an open issue, it clearly required that a "successful candidate" have "substantial litigation or litigation management experience." Position Description, JA 59. Moreover, Fannie Mae in fact based its hiring decision, at least in part, on the applicants' litigation experience, giving final consideration only to those candidates with significant litigation experience. See SJA at 1-11.[4] Because Carpenter failed to rebut Fannie Mae's legitimate business reasons for the two challenged actions, the district court properly granted summary judgment to Fannie Mae. *See Fischbach*, 86 F.3d at 1183 (absent pretext, "court must respect the employer's unfettered discretion to choose among qualified candidates").

Carpenter alternatively sought remand for discovery under Fed.R.Civ.P. 56(f) (allowing pre-summary judgment

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4. Carpenter argues for the first time on appeal that evidence of the candidates' credentials included in their resumes was inadmissible hearsay and that statements in Kelly's declaration relating to those credentials did not conform with Fed.R.Civ.P. 56(e) (requiring affidavits based on "personal knowledge"). Carpenter waived these arguments by not raising them below and therefore we need not consider them. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C.Cir.1984).

discovery if "it appear[s] from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party's opposition"). Carpenter, however, had to indicate what facts she intended to discover that would create a triable issue and why she could not produce them in opposition to the motion. *See Strang v. United States Arms Control & Disarmament Agency,* 864 F.2d 859, 861 (D.C.Cir.1989). "It is well settled that [c]onclusory allegations unsupported by factual data will not create a triable issue of fact." *Exxon Corp. v. FTC*, 663 F.2d 120, 126-27 (D.C.Cir.1980) (quotation omitted, alteration original).

Carpenter sought discovery relating to her performance downgrade by merely pointing to the disparity between Williams's and St. John's criticisms and the compliments of other coworkers and arguing that "this contrast raises an inference that the criticisms were fabricated or, at a minimum, immaterial," Appellant's Br. at 32, a plainly conclusionary assertion without supporting facts. Carpenter also alleged that other vice presidents performed worse or no better than she did but offered no reasonable basis to suggest that discovery would show either that Fannie Mae made an error too obvious to be unintentional or actually believed that she performed better than her peers. *See Fischbach,* 86 F.3d at 1182 (to show pretext, issue is not correctness of employer's reasons but whether it honestly believes them). In fact, to the contrary, Marra averred in his affidavit that "[b]ased on my own experience and comments from Senior Vice Presidents who are clients of the Vice Presidents, the four Vice Presidents who received ratings of 5 or 5- exemplified [the high standards of the Legal Department], and their contributions clearly exceeded that of their peers." JA 55. Carpenter further suggested that litigation experience is a false credential for senior vice president but failed to describe what new facts she believed

could be obtained by discovery to support her theory. *See Strang*, 864 F.2d at 861 (desire to "test" affiants' testimony does not justify Rule 56(f) discovery). Instead, Carpenter supported her request for discovery with undisputed facts--that senior vice presidents in the past lacked litigation expertise and that the Legal Department does not engage directly in litigation--which in themselves do not create an inference of pretext. Accordingly, the district court did not abuse its discretion in denying Carpenter's discovery request. *See Exxon Corp.*, 663 F.2d at 126 (Rule 56(f) ruling reviewed for abuse of discretion).

For the foregoing reasons, the district court's grant of summary judgment to the Federal National Mortgage Association is

Affirmed.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOANN CARPENTER,
Plaintiff

v. Civil Action No. 98-563

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Defendant

MEMORANDUM OPINION AND ORDER

This action comes before the Court on Defendant Federal National Mortgage Association's Motion for Summary Judgment. The Court has carefully considered Defendant's Motion for Summary Judgment, Plaintiff's Opposition to this Motion and Defendant's Reply thereto. For the reasons set forth herein, Defendant's Motion for Summary Judgment is granted.

I. Background

Plaintiff Joann Carpenter has served as a Vice President in the Office of General Counsel at the Federal National Mortgage Association ("Fannie Mae") from 1987 to the present. She brought an action for gender discrimination and retaliation against Fannie Mae on October 17, 1996. In that action, after the close of discovery, Fannie Mae filed a motion for summary judgment which this Court granted in an October 28, 1997 memorandum opinion and order.

Plaintiff filed another action on March 5, 1998 for retaliation. That action is the subject of this opinion. Here, Carpenter claims that Fannie Mae retaliated against her for bringing the prior lawsuit by not selecting her for a Senior Vice President position and by downgrading her performance rating by one-half step in 1997. According to Carpenter, soon after she filed the 1996 lawsuit, Anastasia Kelly, one of Carpenter's supervisors, told her that she "should not cut off her nose to spite her face." Anthony Marra, another one of her supervisors, allegedly said that she should drop her claim. According to Carpenter, due to the contentiousness of the earlier litigation, her working relationship with her supervisors became strained.

Carpenter applied for a Senior Vice President position in 1997. The Position Description for this position called for, among other things, a candidate with litigation experience. Carpenter does not have experience in litigation. Carpenter states that she is qualified for this position. She submitted a written summary of her qualifications when she applied. Fannie Mae interviewed Carpenter for this position, but did not select her for further consideration. At the time Fannie Mae filed this motion, it had not yet selected the person to fill this position. It had, however, narrowed down the pool to three external candidates, all of whom possessed extensive litigation experience.

Also, Carpenter contends that she should have received a higher rating that she did for her 1997 performance. Fannie Mae evaluates its employees annually. It gives each person a numerical rating on a scale of 1 to 5. This rating corresponds with a written description: 5 indicates that the person significantly exceeded her objectives; 4 indicates that the person frequently exceeded her objectives, etc. Compensation decisions are based directly on the numerical performance rating. Part of what determines an employee's rating is how that person compares to others in the same position. In both

1995 and 1996 Carpenter received a 5-. In 1997 she received a 4+. Carpenter states that she should have received a 5- because her performance has not changed since 1996. Fannie Mae reorganized its legal department in July 1996. As a result, more people served as Vice President than in previous years. The only Vice Presidents who received a better rating than Carpenter in 1997 were persons to whom Carpenter had never been compared and Joseph Biegel who received a higher rating than Carpenter in 1996.

II. Discussion

Carpenter claims that Fannie Mae retaliated against her in violation of the District of Columbia Human Rights Act ("DCHRA"). D.C.Code §§ 1-2501 *et seq.*[1] Specifically, Carpenter claims that Fannie Mae failed to promote her to Senior Vice President and downgraded her performance by one-half step because she brought a discrimination claim in 1996.

Fannie Mae filed a motion for summary judgment prior to discovery. Rule 56(f) of the Federal Rules of Civil Procedure determines whether the Court should grant a summary judgment motion prior to discovery. Fed. R.Civ.P. 56(f). It gives the Court discretion to allow discovery prior to granting summary judgment where "it appear[s] from the affidavits of a party opposing the motion that the party cannot for the reasons stated present by affidavit facts essential to justify the party opposition..." *Id.* The Court "...should continue a summary judgment motion upon a good faith showing by affidavit that the continuance is needed to obtain facts essential to preclude summary judgment." *State of*

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1 In interpreting the DCHRA, the District of Columbia looks to the federal statutes and case law. *See Blackman v. Visiting Nurses Assoc.*, 694 A.2d 865, 868 (D.C. 1997).

California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The nonmoving party has the burden of showing what facts she hopes to discover that would creates a triable issue of fact and what reason justifies her inability to produce them on the motion. *Hotel & Restaurant Employees Union, Local 25, et al. v. Attorney General of the United States*, 804 F.2d 1256, 1259 (D.C.Cir. 1986). The party seeking a continuance must explain why she cannot present facts to oppose summary judgment and how additional discovery will promote the facts. *Medina v. Runyon,* Civ.A.No. 95-1446, 1996 WL 346960 at *1 (D.D.C. 1996). Here, the crux of this motion hinges on whether Carpenter can show that through discovery she can elicit facts that will demonstrate pretext.

A plaintiff can prove a retaliation claim through either direct or indirect evidence. *Kale Kiristos v. CTS Motel Management Corp.*, 95 F.Supp. 641, 665 (D.D.C. 1997); *see O'Donnell v. Associated Gen. Contractors of Am., Inc.,* 645 A.2d 1084, 1086 (D.C. 1994)(Courts use the burden of proof for a claim of disparate treatment based on federal law in applying the District of Columbia Human Rights Act). Here, Carpenter contends that both direct and indirect evidence require the Court to deny Fannie Mae's Motion for Summary Judgment.

1. <u>Direct evidence of retaliation</u>

Carpenter asserts that direct evidence of retaliation precludes the Court from granting Defendant's Motion. A plaintiff may relay on direct evidence to prove retaliation. *Kale Kiristos,* 95 F.Supp. at 665. But, direct evidence does not include stray remarks made in the workplace, particularly those made by a non-decision maker or those made by a decision-maker, but unrelated to the decisional process. *Id.* (*citing Ayala-Gerena v. Bristol Myers Squibb Co.*, 95 F.3d 86, 96 (1st

Cir. 1996). Rather, there must me a nexus between the stray remarks and the adverse employment decision. *Id.*

As direct evidence of retaliation, Carpenter points to statements Kelly and Marra allegedly made that she argues threaten retaliation. According to Carpenter, Kelly told her that she "should not cut off her nose to spite her face." Marra stated that she should drop her claim. Carpenter states that they made these comments in attempt to make her drop her 1996 lawsuit. According to Carpenter, then, these remarks relate to her 1996 suit rather than the present one. Therefore, Carpenter is essentially conceding that there is no nexus between these remarks and the instant litigation. Thus, she has not proffered any evidence or even suggested that evidence might exist that will show how these remarks relate to the instant claim of retaliation. For this reason, direct evidence of retaliation will not defeat Fannie Mae's Motion for Summary Judgment.

2. <u>Indirect evidence of retaliation</u>

If a plaintiff cannot defeat a motion for summary judgment through direct evidence, she may use the three part burden-shifting test laid out in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). *See O'Donnell* 645 A.2d at 1086 (D.C. 1994)(Courts use the burden of proof for a claim of disparate treatment based on federal law applying the DCHRA). First, the plaintiff must establish a *prima facie* case of retaliation. *McDonnell Douglas*, 411 U.S. at 1824. Next, the defendant must articulate a legitimate nondiscriminatory reason for its decision or action. *Id.* Finally, the plaintiff must establish by a preponderance of the evidence that the defendant's articulated reason is pretextual. *Id.; St. Mary's Honor Society v. Hicks,* 509 U.S. 502, 514 (1993).

a. The Senior Vice President position

Carpenter claims that Fannie Mae retaliated against her by not selecting her to be Senior Vice President. Regardless of whether Carpenter can establish a *prima facie* case, Fannie Mae has articulated a legitimate nondiscriminatory reason for its action; Carpenter did not possess the qualifications Fannie Mae sought for the Senior Vice President. The Position Description sought a person with "substantial litigation or litigation management experience." As a Vice President in the Legal Department, it is undisputed that Carpenter lacks litigation experience. At the time Fannie Mae filed its motion, it had not yet selected the Senior Vice President, but had narrowed down the pool to three external candidates. Each of these candidates had extensive litigation experience. Furthermore, Fannie Mae selected no internal Vice President to be in the pool of candidates chosen for further consideration, including Vice Presidents who received a higher performance rating than Carpenter. Yet, Carpenter alleges that Fannie Mae's litigation experience requirement is a pretext for retaliation because Fannie Mae lawyers do no engage directly in litigation and because she is qualified to be Senior Vice President.[2]

"'Denial of a Rule 56(f) application is proper where it is clear that the evidence sought is almost certainly nonexistent or is the object of pure speculation.'" *Campbell,* 138 F.3d at

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2 Though Carpenter seeks discovery to show that the litigation experience requirement is a pretext, she does not suggest that she requires further discovery to show that she is qualified. She has presented evidence of her qualifications in her opposition. Nonetheless, that she may be qualified to be Senior Vice President will not defeat her summary judgment motion. The Court will not intrude on an employer's "unfettered discretion to choose among qualified candidates." *Fishbach v. District of Columbia Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996).

779-80. Through discovery, Carpenter suggests that she can find out the "real reasons" for not selecting Carpenter and the reason Fannie Mae's legal department needs an attorney with litigation experience. But, here it is undisputed that each member of the narrowed pool of candidates for Senior Vice President possessed significant litigation experience. It is further undisputed that Fannie Mae selected none of its Vice Presidents for further consideration. That Fannie Mae did not really seek litigation experience is purely Carpenter's guess. Undisputed facts suggest otherwise. Carpenter's request for discovery fails to state with specificity which new facts she believes can be obtained by discovery or the facts she specifically needs to support her theory. "Something more than a fanciful allegation is required to justify denying a motion for summary judgment, . . . , A bare assertion that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." *Contemporary Mission v. United States Postal Service*, 648 F.2d 97, 107 (2nd Cir. 1981).

Additionally, the resumes of the candidates selected for further consideration reveal that they are all accomplished attorneys who meet the other criteria Fannie Mae requested in its Position Description. Thus, the Court can assume Fannie Mae considered these candidates qualified. Carpenter's resume and work history suggest that she also meets these criteria, and is, therefore, qualified in these other respects. But, short of an error too obvious to be unintentional, the Court will respect Fannie Mae's "unfettered discretion to choose among qualified candidates." *Fishbach v. District of Columbia Dept. of Corrections,* 86 F.3d 1180, 1182 (D.C. Cir. 1996). Therefore, the Court will grant summary judgment with respect to Carpenter's claim that Fannie Mae retaliated against her when it denied her the Senior Vice President position.

b. Carpenter's downgrade

Carpenter alleges that Fannie Mae retaliated against her when it gave her a 4+ rating for 1997 rather than a 5- or higher. She reasons that because she previously received a 5- and her performance has not changed, she must have earned a 5- for 1997. Fannie Mae explains, however, that the group of Vice Presidents expanded and became more competitive in 1997 as a result of a July 1996 reorganization. The ratings Vice Presidents receive are determined by comparing performance among Vice Presidents. The 1997 ratings compared Carpenter to Vice Presidents to whom she had never been compared. Of those Vice Presidents that received higher ratings than Carpenter, only one had been compared to Carpenter previously and that person had previously received a higher rating than Carpenter. Fannie Mae cites negative evaluations Carpenter received from Senior Vice Presidents in various departments and contrasts those with uniformly positive comments other Vice Presidents received in explaining Carpenter's rating. This explanation is a legitimate, non-discriminatory reason for Carpenter's downgrade.

Carpenter attempts to show pretext by introducing evidence of positive evaluations she received from the staff of the Senior Vice Presidents who criticized her. She argues that these positive comments contradict with the negative evaluations she received and show that the Senior Vice Presidents acted with retaliatory motive by giving negative evaluations. Carpenter suggests that through further discovery she can show that the Senior Vice Presidents who criticized her performance fabricated these criticisms to conceal a retaliatory motive. She also asserts that she can show pretext through further discovery by showing that the Vice Presidents who received better ratings than she did performed at the same level or worse than she did.

If Carpenter were able to show that Fannie Mae encouraged Senior Vice Presidents to fabricate criticisms, this would be evidence of a retaliatory motive. A plaintiff, however, cannot defeat a motion for summary judgment "by merely restating the conclusory allegations contained in his complaint and amplifying them only with speculation about what discovery might uncover." *Contemporary Mission, Inc. v. United States Postal Service*, 648 F. 97, 107 (2nd Cir. 1981); *see also, Novecon, Ltd. v. Bulgarian-American Enterprise Fund, et al.*, 977 F.Supp. 52, 55 (D.D.C. 1997)("'if the court determines that, . . . discovery would be wholly speculative, relief under Rule 56(f) must be denied'") *quoting Greenberg v. FDA* (citation omitted). Here Carpenter is merely speculating that Senior Vice Presidents fabricated criticisms of her. Nothing suggests that she can obtain evidence to support this. The fact that she received commendations from the staff of the Senior Vice Presidents does not support her allegation of fabrication. There is nothing inconsistent about Carpenter receiving positive feedback from the staff of Senior Vice Presidents and receiving specific criticisms from the Senior Vice Presidents themselves. In keeping with case law, this Court will not permit Carpenter to engage in open-ended exploration in the hopes of discovering evidence that might support her claim. Carpenter's suggestions that discovery might reveal evidence that Senior Vice Presidents fabricated criticisms of her will not defeat Fannie Mae's summary judgment motion.

Carpenter suggests that discovery might show that other Vice Presidents preformed no better or perhaps worse than she did. Even if discovery might reveal that she actually performed better, this will not satisfy Carpenter's burden. Rather, absent a showing that Fannie Mae made an error too obvious to be unintentional, to show pretext, Carpenter must show that Fannie Mae actually believed that she performed better than

other vice presidents. *See Fishbach,* 86 F.3d at 1182 (in showing pretext, the issue is not the correctness or desirability of the reasons it offers, but whether the employer honestly believes the reasons it offers). Through Carpenter states that Fannie Mae believed she performed better, like her other claims, this statement is purely speculation and will not satisfy her burden under Rule 56(f).

III. Conclusion

Upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's Motion in Opposition and Defendant's Reply thereto, it is by the Court this 3rd day of August 1998,

ORDERED, that Defendant's Motion for Summary Judgment band hereby is **GRANTED;** and it is

FURTHER ORDERED, that this case be and hereby is **DISMISSED WITH PREJUDICE.**

Aubrey E. Robinson, Jr.
United States District Judge

Appendix C

PART I.

GOVERNMENT OF DISTRICT
TITLE 1. ADMINISTRATION
CHAPTER 25. HUMAN RIGHTS
SUBCHAPTER II.
PROHIBITED ACTS OF DISCRIMINATION

§ 1-2525. Coercion, retaliation and interference with equal opportunity rights; whistle-blowers

(a) It shall be an unlawful discriminatory practice to coerce, threaten, retaliate against, or interfere with any person in the exercise or enjoyment of, or on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected under this chapter.

(b) It shall be an unlawful discriminatory practice for any person to require, request, or suggest that a person retaliate against, interfere with, intimidate or discriminate against a person, because that person has opposed any practice made unlawful by this chapter, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing authorized under this chapter.

(c) It shall be an unlawful discriminatory practice for any person to cause or coerce, or attempt to cause or coerce, directly or indirectly, any person to prevent any person from complying with the provisions of this chapter.